

CENTRAL DISTRICT OF CALIFORNIA

Defendant.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiff presents one disputed issue for decision, whether the Administrative

1 Law Judge (“ALJ”) properly evaluated plaintiff’s testimony. Plaintiff’s
2 Memorandum in Support of Complaint (“P. Mem.”) at 5-12; *see* Defendant’s
3 Memorandum in Support of Answer (“D. Mem.”) at 1-4.

4 Having carefully studied the parties’ memoranda on the issue in dispute, the
5 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
6 that, as detailed herein, the ALJ failed to properly evaluate plaintiff’s subjective
7 complaints. The court therefore remands this matter to the Commissioner in
8 accordance with the principles and instructions enunciated herein.

9 II.

10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 Plaintiff, who was 50 years old on the alleged disability onset date, is a high
12 school graduate. AR at 637, 667. Plaintiff has past relevant work as an
13 administrative clerk and receptionist. *Id.* at 657.

14 On April 10, 2015 and September 3, 2015, plaintiff filed applications for a
15 period of disability, DIB, and SSI, alleging an onset date of May 19, 2014 due to
16 tendonitis, high blood pressure, high cholesterol, carpal tunnel syndrome, herniated
17 disc, spinal stenosis, pinched nerve, and anxiety. *Id.* at 667-68, 743. The
18 Commissioner denied plaintiff’s application initially, after which she filed a
19 request for a hearing. *Id.* at 681-87.

20 On June 7, 2017, plaintiff, represented by counsel, appeared and testified at
21 a hearing before the ALJ. *Id.* at 632-65. The ALJ also heard testimony from Jeff
22 L. Clark, a vocational expert. *Id.* at 657-63. On October 25, 2017, the ALJ denied
23 plaintiff’s claims for benefits. *Id.* at 34-44.

24 Applying the well-known five-step sequential evaluation process, the ALJ
25 found, at step one, that plaintiff had not engaged in substantial gainful activity
26 since May 19, 2014, the alleged onset date. *Id.* at 37.

27 At step two, the ALJ found plaintiff suffered from the following severe
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1 impairments: degenerative disease of the cervical spine with disc protrusions,
2 stenosis, and radiculopathy; degenerative disc disease of the lumbar spine with disc
3 protrusions, stenosis, radiculopathy, and facet arthropathy; osteophytes of the
4 thoracic spine; right shoulder impingement and tendonitis; right adhesive capsulitis
5 and degenerative changes of the right acromioclavicular joint; right carpal tunnel
6 syndrome; bilateral lateral epicondylitis; left nerve ulnar entrapment at the elbow;
7 left carpal tunnel syndrome and cubital tunnel syndrome; status post left ulner
8 nerve transposition and carpal tunnel releases; bilateral de Quervains tenosynovitis;
9 status post bilateral tendon releases; small nerve fiber neuropathy; left trigger
10 thumb status post release; hypertension; and hyperlipidemia. *Id.*

11 At step three, the ALJ found plaintiff's impairments, whether individually or
12 in combination, did not meet or medically equal one of the listed impairments set
13 forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the "Listings"). *Id.* at 39.

14 The ALJ then assessed plaintiff's residual functional capacity ("RFC"),¹ and
15 determined she had the RFC to perform less than the full range of light work, with
16 the limitations that plaintiff could: lift and carry 20 pounds occasionally and 10
17 pounds frequently; stand or walk for six hours in an eight-hour day; sit for six
18 hours in an eight-hour day; occasionally climb ramps and stairs; occasionally
19 balance, stoop, kneel, crouch, and crawl; but never climb ladders, ropes, and
20 scaffolds; and never work around protected heights. *Id.* With regard to the
21 bilateral upper extremities, the ALJ also precluded plaintiff from above shoulder
22 work, including overhead reaching, but determined she could engage in frequent
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

1 handling and fingering. *Id.*

2 The ALJ found, at step four, that plaintiff could perform her past relevant
3 work as an administrative clerk and receptionist. *Id.* at 42.

4 In the alternative, the ALJ found at step five, considering plaintiff's age,
5 education, work experience, and RFC, there were jobs that existed in significant
6 numbers in the national economy that plaintiff could perform, including food
7 preparation worker, hostess, and counter clerk. *Id.* at 43-44. Consequently, the
8 ALJ concluded plaintiff did not suffer from a disability as defined by the Social
9 Security Act. *Id.* at 44.

10 Plaintiff filed a timely request for review of the ALJ's decision, which was
11 denied by the Appeals Council. *Id.* at 1-4. The ALJ's decision stands as the final
12 decision of the Commissioner.

13 III.

14 STANDARD OF REVIEW

15 This court is empowered to review decisions by the Commissioner to deny
16 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
17 Administration must be upheld if they are free of legal error and supported by
18 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
19 (as amended). But if the court determines the ALJ's findings are based on legal
20 error or are not supported by substantial evidence in the record, the court may
21 reject the findings and set aside the decision to deny benefits. *Aukland v.*
22 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
23 1144, 1147 (9th Cir. 2001).

24 "Substantial evidence is more than a mere scintilla, but less than a
25 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such
26 "relevant evidence which a reasonable person might accept as adequate to support
27 a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
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1 F.3d at 459. To determine whether substantial evidence supports the ALJ's
2 finding, the reviewing court must review the administrative record as a whole,
3 "weighing both the evidence that supports and the evidence that detracts from the
4 ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "'cannot be
5 affirmed simply by isolating a specific quantum of supporting evidence.'" *Aukland*,
6 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
7 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
8 the ALJ's decision, the reviewing court "'may not substitute its judgment for that
9 of the ALJ.'" *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
10 1992)).

11 IV.

12 DISCUSSION

13 Plaintiff contends the ALJ failed to properly evaluate her testimony. P.
14 Mem. at 5-12. Specifically, plaintiff argues the ALJ's sole reason for discounting
15 her testimony was a lack of supporting objective medical evidence, and that this by
16 itself was not clear and convincing. *Id.*

17 At the hearing, plaintiff testified she suffered from neck, shoulder, back,
18 hand, and elbow pain. *See* AR at 644-45, 650. Plaintiff stated the pain was
19 sometimes severe and sometimes tolerable. *Id.* at 645. Plaintiff was unable to sit
20 for longer periods and did not drive. *See id.* at 650-51. She was able to stand for
21 approximately twenty minutes at a time, could walk about a block, and could not
22 lift a gallon of milk. *See id.* at 651-53.

23 An ALJ must make specific credibility findings, supported by the record.
24 Social Security Ruling ("SSR") 96-7p. To determine whether testimony
25 concerning symptoms is credible, an ALJ engages in a two-step analysis.
26 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, an ALJ must
27 determine whether a claimant produced objective medical evidence of an
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1 underlying impairment ““which could reasonably be expected to produce the pain
2 or other symptoms alleged.”” *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d
3 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of
4 malingering, an “ALJ can reject the claimant’s testimony about the severity of her
5 symptoms only by offering specific, clear and convincing reasons for doing so.”
6 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *accord Burrell v. Colvin*,
7 775 F.3d 1133, 1136 (9th Cir. 2014). An ALJ may consider several factors in
8 weighing a claimant’s credibility, including: (1) ordinary techniques of credibility
9 evaluation such as a claimant’s reputation for lying; (2) the failure to seek
10 treatment or follow a prescribed course of treatment; and (3) a claimant’s daily
11 activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*,
12 947 F.2d at 346-47.

13 At the first step, the ALJ here found plaintiff’s medically determinable
14 impairments could reasonably be expected to cause the symptoms alleged. AR at
15 39. At the second step, because the ALJ did not find any evidence of malingering,
16 the ALJ was required to provide clear and convincing reasons for discounting
17 plaintiff’s testimony. The ALJ provided four reasons for discounting plaintiff’s
18 testimony: (1) her alleged symptoms were inconsistent with the objective medical
19 evidence; (2) she received mild and conservative care; (3) she made an inconsistent
20 statement; and (4) the epidural injections provided plaintiff three weeks of relief.
21 *See id.* at 39-42. Although the ALJ only expressly cited one reason for finding
22 plaintiff’s testimony less credible – the lack of objective medical evidence to
23 support the symptoms – the ALJ included the latter three reasons in his credibility
24 discussion and they can reasonably be inferred as additional grounds for the
25 adverse credibility finding. *See id.*; *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th
26 Cir. 1989) (an ALJ need not recite “magic words,” a reviewing court may draw
27 inferences from an opinion).

1 The ALJ's first reason for finding plaintiff's testimony less than fully
2 credible was her subjective complaints were not supported by the objective
3 medical evidence. *See* AR at 39-42; *Rollins v. Massanari*, 261 F.3d 853, 857 (9th
4 Cir. 2001) (the lack of corroborative objective medical evidence may be one factor
5 in evaluating a claimant's credibility). The ALJ relied on a selective citation to a
6 few findings and Dr. Marvin Perer's opinion that plaintiff can perform medium
7 work to support his conclusion. The citations and Dr. Perer's opinion are not
8 substantial evidence.

9 As an initial matter, to the extent the ALJ relied on Dr. Marvin Perer's
10 opinion that plaintiff was capable of medium work to discount her testimony
11 concerning her lumbar and cervical spine, the reliance was misplaced. *See* AR at
12 40, 1030-35. Dr. Perer reviewed only five or six days of treatment notes, some of
13 which were from prior to the alleged onset of disability or unrelated, and examined
14 plaintiff once. *Id.* at 894-95, 912-13, 914-24, 1030. Noting Dr. Perer, a
15 consultative internist, examined plaintiff on one occasion and did not review her
16 medical records, the ALJ only gave Dr. Perer's opinion partial weight. *See id.* at
17 41, 1030; *see also McKinzie v. Colvin*, 634 Fed. Appx. 177, 179-80 (9th Cir. 2015)
18 (failure to review a claimant's medical record may be a legitimate reason for
19 discounting a physician's opinion). Yet the ALJ indicated he relied on Dr. Perer's
20 opinion that plaintiff is capable of medium work as evidence that plaintiff's
21 symptoms are not credible. *See* AR at 40. The ALJ cannot have it both ways.

22 As for the objective medical findings, the ALJ acknowledged the medical
23 imaging clearly indicates plaintiff suffered from, among other things, disc
24 dessication and herniation at multiple levels, severe central canal stenosis,
25 moderate to severe neural foraminal stenosis, radiculopathy, right shoulder
26 impingement, right shoulder tendinosis, and cysts. *See id.* at 516, 518, 562-67,
27 571-72, 1683. Nevertheless, the ALJ determined plaintiff's symptoms were less
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1 than credible due to some normal findings. *Id.* at 40.

2 With respect to plaintiff's cervical and lumbar pain, the ALJ noted that
3 plaintiff had normal range of motion in his cervical and lumbar spine in December
4 2014 and July 2015. *Id.* The ALJ also relied on three additional findings from the
5 July 2015 consultative examination that plaintiff: had a normal gait; had a
6 negative straight leg raise test; and could get on and off the examination table
7 without difficulty. *Id.* Here, the ALJ selectively referred to some normal findings
8 from two days while ignoring the remaining objective evidence. In addition to the
9 imaging, other treating and examining physicians observed plaintiff had, among
10 other things, tenderness, decreased range of motion, spasm in the lumbar and
11 cervical spine, and positive straight leg raise tests. *See, e.g., id.* at 529, 1656, 1695,
12 1781, 2034. Although physicians also observed plaintiff had a normal range of
13 motion in her neck on occasion, it was often achieved with pain. *See, e.g., id.* at
14 584, 1430. Moreover, other treating physicians observed similar findings of
15 normal range of motion or gait, but concluded plaintiff required surgery. *See, e.g.*
16 *id.* at 581, 589. The fact that plaintiff sometimes had some normal findings was
17 therefore inadequate to discount her testimony, particularly in light of her complete
18 medical record. *See Schow v. Astrue*, 272 Fed. Appx. 647, 652-53 (9th Cir. 2008)
19 (even with the inclusion of some normal findings, the ALJ's reasons were
20 inadequate to support his credibility determination). Indeed, plaintiff's occasional
21 normal findings were consistent with her testimony that her pain level fluctuated
22 day to day. *See AR* at 645.

23 Similarly, with respect to plaintiff's complaints about her right shoulder, the
24 ALJ cited an April 2015 finding that plaintiff had no weakness and full strength,
25 and the consultative examiner's findings that plaintiff had no tenderness or
26 swelling. *See id.* at 40. Again, the record is replete with findings of decreased
27 range of motion, pain, and tenderness, as well as a recommendation for surgery.
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1 *See, e.g., id.* at 529, 605, 1064, 1263, 1485. Indeed, the ALJ acknowledges Dr.
2 Perer even observed a decreased range of motion. *See id.* at 40, 1033. Looking at
3 the medical record as a whole, on balance, it cannot be said that the objective
4 medical evidence did not support plaintiff's complaints about her right shoulder.

5 Moreover, although the lack of objective medical evidence to support
6 allegations of limitations is a factor that may be considered when evaluating
7 credibility, it is insufficient by itself. *See Bunnell*, 947 F.2d at 345 (an ALJ "may
8 not reject a claimant's subjective complaints based solely on a lack of objective
9 medical evidence to fully corroborate the alleged severity of pain"). Thus, even
10 assuming the ALJ correctly found the plaintiff's symptoms were not supported by
11 the objective medical evidence, it cannot constitute a clear and convincing reason
12 supported by substantial evidence if it is the only reason for the adverse finding.

13 Here, the ALJ provided three other reasons for the adverse credibility
14 finding, but none are supported by the evidence. The second reason the ALJ gave
15 was that plaintiff received mild and conservative treatment. AR at 40; *see Parra v.*
16 *Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) ("[E]vidence of 'conservative treatment'
17 is sufficient to discount a claimant's testimony regarding severity of an
18 impairment."); *Tommasetti*, 533 F.3d at 1039-40 (conservative treatment may be a
19 clear and convincing reason for discounting a claimant's credibility). Plaintiff was
20 treated with acupuncture, physical therapy, chiropractic care, pain medications
21 including narcotics, epidural injections, and surgery. *See, e.g.,* AR at 126, 199-
22 201, 581, 605. While pain medication, acupuncture, physical therapy, and
23 chiropractic care are considered conservative, the use of narcotic medication in
24 conjunction with epidural injections is not. *See, e.g., Lapeirre-Gutt v. Astrue*, 382
25 Fed. Appx. 662, 664 (9th Cir. 2010) (treatment consisting of "copious" amounts of
26 narcotic pain medication, occipital nerve blocks, and trigger point injections was
27 not conservative); *Tommasetti*, 533 F.3d at 1040 (characterizing physical therapy
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1 as conservative); *Christie v. Astrue*, 2011 WL 4368189, at *4 (C.D. Cal. Sept. 16,
2 2011) (treatment with narcotics, steroid injections, trigger point injections, epidural
3 injections, and cervical traction was not conservative). Moreover, surgery is
4 unquestionably not mild and conservative. Plaintiff underwent surgery for her
5 carpal tunnel syndrome and was recommended surgery for her cervical spine,
6 lumbar spine, and right shoulder. AR at 339, 589, 605, 648, 2482. Although the
7 insurance company denied authorization for the right shoulder surgery, the fact
8 remains that surgery was recommended as a course of treatment. *See Orn v.*
9 *Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (failure to seek treatment may be a basis
10 for an adverse credibility finding unless there was a good reason for not doing so).
11 Therefore, the record plainly reflects plaintiff did not receive only mild and
12 conservative treatment.

13 The third reason the ALJ provided for finding plaintiff's testimony not
14 credible was she made an inconsistent statement. AR at 40; *see Bunnell*, 947 F.2d
15 at 346 (an ALJ "may discredit the claimant's allegations based on
16 inconsistencies"). Specifically, the ALJ noted plaintiff testified epidural injections
17 did not help her pain, but had previously reported that she had three weeks of relief
18 after receiving a lumbar epidural injection.² AR at 40, 638, 642, 1996. This
19 inconsistency was not a clear and convincing reason to discount plaintiff's
20 testimony. First, it is unclear that plaintiff's testimony was inconsistent with her
21 earlier report. The question itself was open to interpretation. Plaintiff could have
22 reasonably interpreted the ALJ as asking whether the injections provided
23 significant or long term relief, which the record reflects it did not. Second, to the
24 extent that plaintiff's testimony was inconsistent with her earlier report, it was
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27 ² By the times of the June 7, 2017 hearing, plaintiff had already received three
28 epidural injections in her lumbar spine, three epidural injections in her cervical
spine, and one or two injections in the shoulder. *See* AR at 126, 643.

1 minor. *See Gonzalez v. Astrue*, 253 Fed. Appx. 654, 655 (9th Cir. 2007) (holding
2 that an inconsistency relating to claimant's education was minor and not material);
3 *Rocha v. Astrue*, 2010 W L797160, at *5 (C.D. Cal. Mar. 5, 2010) (finding that
4 minor inconsistencies in daily activities did not impugn claimant's credibility).
5 The fact that plaintiff testified the injections did not help rather than testifying they
6 provided three weeks of relief was minor given that she consistently stated that the
7 injections did not provide significant long-term relief.

8 Finally, the temporary relief plaintiff experienced from the injections was
9 not a basis for an adverse credibility finding. *See, e.g., Salcido v. Saul*, 2019 WL
10 2516875, at *4 (C.D. Cal. June 18, 2019) (ALJ improperly discounted plaintiff's
11 credibility because she reported improvements when the improvements were only
12 temporary); *Marshall v. Berryhill*, 2017 WL 2060658, at *14 (S.D. Cal. May 12,
13 2017) (temporary relief does not constitute sustained improvement in symptoms
14 that justifies discrediting a claimant's testimony); *Strange v. Colvin*, 2016 WL
15 226376, at *7 (C.D. Cal. Jan. 19, 2017) ("[T]emporary relief is not a valid reason
16 to find plaintiff less than credible.").

17 Accordingly, the ALJ failed to cite clear and convincing reasons supported
18 by substantial evidence for his adverse credibility finding. Contrary to the ALJ's
19 determination, the objective medical evidence supported plaintiff's alleged
20 symptoms, plaintiff did not receive conservative treatment, plaintiff's inconsistent
21 statement was minor, and temporary relief was not a valid reason to discount.

22 V.

23 **REMAND IS APPROPRIATE**

24 The decision whether to remand for further proceedings or reverse and
25 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
26 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this
27 discretion to direct an immediate award of benefits where: "(1) the record has been
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1 fully developed and further administrative proceedings would serve no useful
2 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
3 evidence, whether claimant testimony or medical opinions; and (3) if the
4 improperly discredited evidence were credited as true, the ALJ would be required
5 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020
6 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with
7 instructions to calculate and award benefits). But where there are outstanding
8 issues that must be resolved before a determination can be made, or it is not clear
9 from the record that the ALJ would be required to find a plaintiff disabled if all the
10 evidence were properly evaluated, remand for further proceedings is appropriate.
11 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
12 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must “remand for
13 further proceedings when, even though all conditions of the credit-as-true rule are
14 satisfied, an evaluation of the record as a whole creates serious doubt that a
15 claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

16 Here, remand is required to resolve the outstanding issue. On remand, the
17 ALJ shall reconsider plaintiff’s credibility and either accept her testimony or
18 provide clear and convincing reasons for rejecting it. The ALJ shall then reassess
19 plaintiff’s RFC and proceed through steps four and five to determine what work, if
20 any, plaintiff was capable of performing.

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1 VI.

2 CONCLUSION

3 IT IS THEREFORE ORDERED that Judgment shall be entered
4 REVERSING the decision of the Commissioner denying benefits, and
5 REMANDING the matter to the Commissioner for further administrative action
6 consistent with this decision.

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9 DATED: September 27, 2019



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11 SHERI PYM
12 United States Magistrate Judge
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